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The statutory and regulatory authority establishing the foundation for the categories of abuse and neglect are found in Chapter 15 of the *Code of Virginia* and 22VAC40-705-30 of the Administrative Code. This section also contains footnotes of relevant court decisions impacting the definition of abuse and neglect for the CPS program.

The Virginia Administrative Code defines abuser or neglector as:

> **22VAC40-705-1: "Abuser or Neglector" means any person who is found to have committed the abuse and/or neglect of a child pursuant to Chapter 15 (§ 63.2- 1500 et seq.) of Title 63.2 of the Code of Virginia.**

The Virginia Administrative Code establishes five categories of abuse or neglect, including:

- Physical abuse
- Physical neglect
- Medical neglect,
- Mental abuse or neglect; and
- Sexual abuse

A. INJURY AND THREAT OF INJURY OR HARM TO A CHILD

Inherent within each category of abuse or neglect is an actual injury or the existence of a threat of an injury or harm to the child. Although there are five categories of abuse or neglect, there are only two kinds of injuries possible; an injury may be a physical injury or a mental injury. Also, an injury may be an actual injury or a threatened injury. The threat of injury has been upheld by the courts.[1]

The CPS worker must consider the circumstances surrounding the alleged act or omission by the caretaker influencing whether the child sustained an injury or whether there was a threat of an injury or of harm to the child. The evidence may establish circumstances that may create a threat of harm.

[1] "[T]he statutory definitions of an abused or neglected child do not require proof of actual harm or impairment having been experienced by the child. The term 'substantial risk' speaks in futuro." *Jenkins v. Winchester Dep't of Soc. Servs.*, 12 Va. App. 1178, 1183, 409 S.E.2d 16, 19 (1991). "The Commonwealth's policy is to protect abused children and to prevent further abuse of those children. This policy would be meaningless if the child must suffer an actual injury from the behavior of his or her parent . . . . [T]he statute [does not] impose such trauma upon a child." *Jackson v. W.*, 14 Va. App. 391, 402, 419 S.E.2d 385, 391 (1992).

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B. PHYSICAL ABUSE

1.0 Statutory and Regulatory Definition

The *Code of Virginia* § 63.2 -100 provides the statutory definition of physical abuse. The Virginia Administrative Code provides the same definition of physical abuse:

> **22VAC40-705-30(A). Physical abuse occurs when a caretaker creates or inflicts, threatens to create or inflict, or allows to be created or inflicted upon a child a physical injury by other than accidental means or creates a substantial risk of death, disfigurement, or impairment of bodily functions.**

2.0 Types of Physical Abuse

The types of physical abuse include but are not limited to:

2.1 Asphyxiation

Asphyxiation means being rendered unconscious as a result of oxygen deprivation.

2.2 Bone fracture

a. Chip fracture: a small piece of bone is flaked from the major part of the bone.
b. Simple fracture: the bone is broken, but there is no external wound.
c. Compound fracture: the bone is broken, and there is an external wound leading down to the site of fracture or fragments of bone protrude through the skin.
d. Comminuted fracture: the bone is broken or splintered into pieces.
e. Spiral fracture: twisting causes the line of the fracture to encircle the bone in the form of a spiral.

2.3 Head Injuries

a. Brain damage: injury to the large, soft mass of nerve tissue contained within the cranium/skull.
b. Skull fracture: a broken bone in the skull.

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c. Subdural hematoma: a swelling or mass of blood (usually clotted) caused by a break in a blood vessel located beneath the outer membrane covering the spinal cord and brain.

2.4 Burns/Scalding

a. Burns: tissue injury resulting from excessive exposure to thermal, chemical, electrical or radioactive agents.
b. Scalds: a burn to the skin or flesh caused by moist heat from vapors or steam.

The degree of a burn must be classified by a physician and are usually classified as:

First degree: superficial burns, damage being limited to the outer layer of skin, scorching or painful redness of the skin.
Second degree: the damage extends through the outer layer of the skin into the inner layers. Blistering will be present within 24 hours.
Third degree: the skin is destroyed with damage extending into underlying tissues, which may be charred or coagulated.

2.5 Cuts, bruises, welts, abrasions

a. Cut: an opening, incision or break in the skin.
b. Bruise: an injury that results in bleeding within the skin, where the skin is discolored but not broken.
c. Welt: an elevation on the skin produced by a lash or blow. The skin is not broken.
d. Abrasions: areas of the skin where patches of the surface have been scraped off.

2.6 Internal injuries

An injury that is not visible from the outside, such as an injury to the organs occupying the thoracic or abdominal cavities.

2.7 Poisoning

Ingestion, inhalation, injection, or absorption of any substance given to a child that interferes with normal physiological functions. The term poison implies an excessive amount as well as a specific group of substances. Virtually any substance can be poisonous if consumed in sufficient quantity.

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2.8 Sprains/Dislocation

a. Sprain: trauma to a joint which causes pain and disability depending upon the degree of injury to ligaments. In a severe sprain, ligaments may be completely torn.
b. Dislocation: the displacement of a bone from its normal position in a joint.

2.9 Gunshot wounds

Wounds resulting from a gunshot.

2.10 Stabbing wounds

Wounds resulting from a stabbing.

2.11 Munchausen Syndrome by Proxy

A condition characterized by habitual presentation for hospital treatment of an apparent acute illness, the patient giving a plausible and dramatic history, all of which is false.[2] Munchausen syndrome by proxy occurs when a parent or guardian falsifies a child's medical history or alters a child's laboratory test or actually causes an illness or injury in a child in order to gain medical attention for the child, which may result in innumerable harmful hospital procedures.[3] This classification must be supported by medical evidence.

2.12 Bizarre Discipline

Bizarre discipline means any actions in which the caretaker uses eccentric, irrational or grossly inappropriate procedures or devices to modify the child's behavior. The caretaker's actions must result in physical harm to the child or create the threat of physical harm to the child.

Bizarre discipline is also a type of mental abuse or neglect.

[2] Dorland's Illustrated Medical Dictionary 1295 (26th ed. 1981).

[3] Zumwalt & Hirsch, *Pathology of Fatal Child Abuse and Neglect*, in Child Abuse and Neglect 276 (R. Helfer & R. Kempe eds., 4th ed. 1987).

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2.13 *Traumatic Inflicted Brain Injury*; Shaken Baby Syndrome; Battered Child Syndrome

Shaken baby syndrome also known as *traumatic inflicted brain injury* and battered child syndrome are caused by nonaccidental trauma.

a. Shaken baby syndrome also known as *traumatic inflicted brain injury* is a medical diagnosis that must be made by a physician. This type of injury occurs during violent shaking of an infant or young child causing the child's head to whip back and forth. The shaking causes the child's brain to move about causing blood vessels in the skull to stretch and tear. The child may suffer one or several of the following injuries: retinal hemorrhages; subdural or subarachnoid hemorrhages; cerebral contusions; skull fracture; rib fractures; fractures in the long bones and limbs; metaphyseal fractures; axonal shearing (tearing of the brain tissue); and cerebral edema (swelling of the brain). The absence of external injury does not rule out a diagnosis of shaken baby syndrome.

b. Battered child syndrome refers to a group of symptoms and behaviors exhibited by a child who has been repeatedly physically abused. Battered child syndrome means a diagnosis by a medical expert involving a child suffering certain types of continuing injuries that were not caused by accidental means.[4] The battered child syndrome "exists when a child has sustained repeated and/or serious injuries by nonaccidental means."[5] Battered child syndrome must be diagnosed by a physician.

Presenting signs and symptoms of this type of injury include: irritability, convulsions, seizures, lethargy or altered level of consciousness, coma, respiratory problems, vomiting, and death.[6]

[4] Black's Law Dictionary, 152 (6th ed. 1990).

[5] *Estelle v. McGuire*, 502 U.S. 62 (1991).

[6] Monteleone, Dr. James A., and Dr. Armand E. Brodeur, *Child Maltreatment: A Clinical Guide and Reference*, 14-16 (G.W. Medical Publishing 1994).

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2.14 Exposure to Sale or Manufacture of Certain Controlled Substances

The sale of drugs by a caretaker in the presence of a child can pose a threat to the child's safety. Manufacturing drugs, especially in methamphetamine laboratories, can expose children to serious toxins. There is more information about specific toxins in the Appendix as well as i*nformation about Schedule 1 and Schedule 2 drugs at the following Department of Justice website:*
http://www.usdoj.gov/dea/pubs/scheduling.html

CPS reports alleging this type of physical abuse must be reported to the Commonwealth Attorney and to local law enforcement. The CPS worker should not be the first responder to a setting where the manufacture of drugs is suspected.

There is a sample protocol for a joint response to these reports with local law enforcement and emergency personnel in the Appendix.

2.15 Other Physical Abuse

Most types of physical abuse of a child can be defined in one of the above types. However, if the child has suffered a type of physical abuse that is not one of the above specified types, the CPS worker may document the type as Other Abuse and specifically describe the type of physical abuse.

3.0 Substantial Risk of Death, Disfigurement, or Impairment of Bodily Functions

The CPS worker may determine that a physical abuse definition has been met when the information collected during the family assessment or investigation establishes that the caretaker created a substantial risk of death, disfigurement or impairment of bodily functions.

C. PHYSICAL NEGLECT

1.0 Statutory and Regulatory Definition

The *Code of Virginia* § 63.2-100 provides the statutory foundation for the definition of physical neglect. The Virginia Administrative Code provides the regulatory definition for physical neglect:

22VAC40-705-30(B). Physical neglect occurs when there is the failure to provide food, clothing, shelter, or supervision for a child to

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the extent that the child's health or safety is endangered. This also includes abandonment and situations where the parent or caretaker's own incapacitating behavior or absence prevents or severely limits the performing of child caring tasks pursuant to § 63.2 –100 of the *Code of Virginia*.

22VAC40-705-30(B)(1). Physical neglect may include multiple occurrences or a one-time critical or severe event that results in a threat to health or safety.

2.0 Types of Physical Neglect

The types of physical neglect include but are not limited to:

2.1 Abandonment

Abandonment means conduct or actions by the caretaker implying a disregard of caretaking responsibilities. Such caretaker actions or conduct includes extreme lack of interest or commitment to the child, or leaving the child without a caretaker and without making proper arrangements for the care of the child and with no plan for the child's care, or demonstrating no interest or intent of returning to take custody of the child.

The *Code of Virginia* §§ 18.2.371, 40.1-103, 8.01-226.5:2, and 63.2-910.1 provide immunity from liability to hospital and rescue squad staff who receive an abandoned infant and provide an affirmative defense in the criminal and civil statutes to any parent who is prosecuted as a result of leaving an infant with these personnel. Hospital and rescue squad staffs are still expected to report these instances of child abandonment and the local departments of social services are required to respond to these reports of child abandonment. Even though these statutes allow an affirmative defense for a parent abandoning her infant under certain conditions, this action still meets the definition of abandonment for a CPS response.

2.2 Inadequate supervision

The child has been left in the care of an inadequate caretaker or in a situation requiring judgment or actions greater than the child's level of maturity, physical condition, and/or mental abilities would reasonably dictate. Inadequate supervision includes minimal care or supervision by the caretaker resulting in placing the child in jeopardy of sexual or other exploitation, physical injury, or results in status offenses, criminal acts by the child, or alcohol or drug abuse.

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2.3 Inadequate clothing

Failure to provide appropriate and sufficient clothing for environmental conditions or failure to provide articles of proper fit that do not restrict physical growth and normal activity.

2.4 Inadequate shelter

Failure to provide protection from the weather and observable environmental hazards, which have the potential for injury or illness, in and around the home.

2.5 Inadequate personal hygiene

Failure to provide the appropriate facilities for personal cleanliness to the extent that illness, disease or social ostracism has occurred or may occur. In the case of a young child, the caretaker must not only provide such facilities but also make use of them for the child.

2.6 Inadequate food

Failure to provide and ensure an acceptable quality and quantity of diet to the extent that illness, disease, developmental delay or impairment has occurred or may result.

2.7 Malnutrition

Chronic lack of necessary or proper nutrition in the body caused by inadequate food, lack of food, or insufficient amounts of vitamins or minerals. This condition requires a medical diagnosis.

*2.*8 Knowingly Leaving a Child with a Person Required to Register as Violent Sex Offender

There are three elements for this type of physical neglect.

1. The parent has knowingly left the child alone with a person not related by blood or marriage; and
2. that person has been convicted of an offense against a minor; and
3. that person is required to register as a violent sexual offender pursuant to the *Code of Virginia* § 9.1-902.

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Some of the offenses for which registration as a violent sexual offender include:

- Abduction with intent to defile;
- Rape;
- Forcible sodomy;
- Object sexual penetration;
- Aggravated sexual battery;
- Sexual battery where the perpetrator is 18 years of age or older and the victim is under the age of six;
- Taking indecent liberties with children; and
- Taking indecent liberties with child by person in custodial or supervisory relationship.

In addition, the *Code of Virginia* requires registration as a violent sexual offender of persons who have committed certain offenses multiple times.

To determine if the report should be validated for this type of physical neglect, the CPS worker must determine if the person is required to register as a violent sexual offender on the Virginia State Police Sex Offender and Crimes Against Minors Registry at: http://sex-offender.vsp.virginia.gov. This registry provides a complete list of offenses and the specific section of the Code of Virginia for which registration as a Sex Offender is required. Each registered offender's web profile will identify the person as either a Violent Sexual Offender or Sexual Offender. In this definition, the alleged abuser is the child's parent or other caretaker who has left the child with a person, not related by blood or marriage, required to register as a violent sex offender.

If the allegations do not meet this specific definition of physical neglect/leaving child with known sex offender, the local agency should evaluate the information to determine if the report should be validated as physical neglect/inadequate supervision by the child's parent or guardian. A child may still be at risk of abuse or neglect by a person who is required to register on the Sex Offender and Crimes Against Minors Registry, but who is not identified as a violent sex offender or who is related to the child by blood or marriage.

If in the course of responding to the physical neglect report, there is reason to suspect the child has been sexually abused, the local worker must enter a separate CPS referral into the automated data system for the sex abuse allegation, the alleged abuser and victim. Refer to Part III: Complaints and

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Reports for new allegations in an existing referral. Sexual abuse complaints must be placed in the Investigation Track.

2.9 Failure to Thrive

22VAC40-705-30(B)(2)(a). Failure to thrive occurs as a syndrome of infancy and early childhood which is characterized by growth failure, signs of severe malnutrition, and variable degrees of developmental retardation.

22VAC40-705-30(B)(2)(b). Failure to thrive can only be diagnosed by a physician and is caused by nonorganic factors.

Failure to thrive describes several conditions in infants and children. Failure to thrive can be caused by a number of medical problems. In some children, failure to thrive can be caused by extreme neglect. Failure to thrive describes the malnourished and depressed condition of infants, implying not only growth deficits, but also disorders of behavior and development. Failure to thrive is classified as organic failure to thrive or nonorganic failure to thrive. Only nonorganic failure to thrive is considered to be a type of physical neglect or mental neglect. For a further discussion about failure to thrive, see the Appendix.

2.10 Other Physical Neglect

Most types of physical neglect a child has suffered can be defined in one of the above types. However, if the child has suffered a type of physical neglect that is not one of the above specified types, the CPS worker may document the type as Other Physical neglect and specifically describe the type of physical neglect.

3.0 Family Poverty and Lack of Resources

22VAC40-705-30(B). In situations where the neglect is the result of family poverty and there are no outside resources available to the family, the parent or caretaker shall not be determined to have neglected the child; however, the local department may provide appropriate services to the family.

The local department should not render a founded disposition of physical neglect when the neglect resulted from poverty and a lack of available resources. If the neglect resulted from poverty, then the local department may provide services in lieu of making a founded disposition. However, in situations where resources are available, a founded disposition may be warranted if, after appropriate services are offered, the caretakers still refuse to accept.

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4.0 Multiple Occurrences or One Time Incident

22VAC40-705-30(B)(1). Physical neglect may include multiple occurrences or a one-time critical or severe event that results in a threat to health or safety.

D. MEDICAL NEGLECT

1.0 Statutory and Regulatory Definition

The statutory foundation for the definition of medical neglect can be found in the *Code of Virginia* § 63.2-100. The regulatory definition of medical neglect follows:

22VAC40-705-30(C). Medical neglect occurs when there is the failure by the caretaker to obtain and or follow through with a complete regimen of medical, mental or dental care for a condition which if untreated could result in illness or developmental delays pursuant to § 63.2-100 of the Code of Virginia. *However a decision by parents or other persons legally responsible for the child to refuse a particular medical treatment for a child with life-threatening condition shall not be deemed a refusal to provide necessary care if (i) such decision is made jointly by the parents or other person legally responsible for the child and the child; (ii) the child has reached 14 years of age and is sufficiently mature to have an informed opinion on the subject of his medical treatment; (iii) the parents or other person legally responsible for the child and the child have considered alternative treatment options; and (iv) the parents or other person legally responsible for the child and the child believe in good faith that such decision is in the child's best interest.*
Medical neglect also includes withholding of medically indicated treatment.

Parents and caretakers have a legal duty to support and maintain their children, including the provision of necessary medical care. Preventive health care, such as obtaining immunizations and well-baby check-ups, is a matter of parental choice. Failure to obtain preventive health care for children does not constitute medical neglect.

2.0 Types of Medical Neglect

Medical neglect includes the caretaker failing to obtain immediate necessary medical, mental or dental treatment or care for a child. Medical neglect also includes when the

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caretaker fails to provide or allow necessary emergency care in accordance with recommendations of a competent health care professional.

2.1 Emergency Medical Care or Treatment

Medical neglect includes a caretaker failing to obtain necessary emergency care or treatment. Cases of acute illness are usually considered emergencies. The clearest examples involve life-saving medical care or treatment for a child.

Other examples include parents refusing to allow a blood transfusion to save a child in shock, or parents refusing to admit a severely dehydrated child to the hospital. Medical neglect includes any life-threatening internal injuries and the parents or caretakers do not seek or provide medical treatment or care. Additional examples include, but are not limited to, situations where the child sustains a fracture, a severe burn, laceration, mutilation, maiming, or the ingestion of a dangerous substance and the caretaker fails or refuses to obtain care or treatment.

2.2 Necessary Medical Care or Treatment

Medical neglect includes a caretaker failing to provide or allow necessary treatment or care for a child medically at risk with a diagnosed disabling or chronic condition, or disease. Such cases may involve children who will develop permanent disfigurement or disability if they do not receive treatment. Examples include children with congenital glaucoma or cataracts, which will eventually develop into blindness if surgery is not performed; a child born with a congenital anomaly of a major organ system.

Another example: Caretaker fails to provide or allow necessary treatment or care for a child medically diagnosed with a disease or condition. Diseases or conditions include, but are not limited to, those requiring continual monitoring, medication or therapy, and are left untreated by the parents or caretakers. Children at greatest medical risk are those under the care of a sub-specialist.

For example, a child has a serious seizure disorder and parents refuse to provide medication; parents' refusal places child in imminent danger. Another example: When a child with a treatable serious chronic disease or condition has frequent hospitalizations or significant deterioration because the parents ignore medical recommendations.

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2.3 Necessary Dental Care or Treatment

Medical neglect includes a caretaker's failure to provide or allow necessary dental treatment or care for a child. Necessary dental care does not include preventive dental care.

2.4 Necessary Mental Care or Treatment

Medical neglect includes a caretaker failure to provide or allow necessary mental treatment or care for a child who may be depressed or at risk for suicide.

2.5 Other Medical Neglect

Most types of medical neglect a child may suffer can be defined in one of the above types. However, if the child has suffered a type of medical neglect that is not one of the above specified types, the CPS worker may document the type as Other Medical Neglect and specifically describe the type of medical neglect.

3.0 Factors to Consider When Determining if Medical Neglect Definition has Been Met

It is the parent's responsibility to determine and obtain appropriate medical, mental and dental care for a child. What constitutes adequate medical treatment for a child must be decided on its own particular facts. The focus of the CPS response is whether the caretaker failed to provide medical treatment and whether the child was harmed or placed at risk of harm as a result of the failure. Cultural and religious child-rearing practices and beliefs that differ from general community standards should not be considered a basis for medical neglect, unless the practices present a specific danger to the physical or emotional safety of the child.

3.1 Treatment or Care Must Be Necessary

The statutory definition of medical neglect requires that the parent neglects or refuses to provide necessary care for the child's health. Therefore, the local department must establish that the caretaker's failure to follow through with a complete regimen of medical, mental or dental care for a child was necessary for the child's health. The result of the caretaker's failure to provide necessary care could be illness or developmental delays.

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The challenging issue is determining when medical care is necessary for the child's health. Obviously, life-saving medical treatment is necessary and falls within the definition. However, when parents or caretakers refuse medical care that is important to their child's well being but is not essential to life, the issue becomes more complicated in determining whether the medical care is necessary.

3.2 Parent Refuses Treatment for Life-Threatening Condition

Pursuant to the *Code of Virginia § 63.2-100, under certain conditions a parent's decision to refuse a particular medical treatment for a child with a life-threatening condition shall not be deemed a refusal to provide necessary care. Those conditions are:*

- *The decision is made jointly by the parents or other person legally responsible for the child and the child;*
- *The child has reached 14 years of age and sufficiently mature to have an informed opinion on the subject of his medical treatment;*
- *The parents or other person legally responsible for the child and the child have considered alternative treatment options; and*
- *The parents or other person legally responsible for the child and the child believe in good faith that such decision is in the child's best interest.*

22VAC40-705-10: Particular Medical Treatment means a process or procedure that is recommended by conventional medical providers and accepted by the conventional medical community.

Sufficiently mature is determined on a case-by-case basis and means that a child has no impairment of his cognitive ability and is of a maturity level capable of having intelligent views on the subject of his health condition and medical care.

Informed opinion means that the child has been informed and understands the benefits and risks, to the extent known, of the treatment recommended by conventional medical providers for his condition and the alternative treatment being considered as well as the basis of efficacy for each, or lack thereof.

Alternative treatment options means treatments used to prevent or treat illnesses or promote health and well-being outside the realm of modern conventional medicine.

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Life-threatening condition means a condition that if left untreated more likely than not will result in death and for which the recommended medical treatments carry a probable chance of impairing the health of the individual or a risk of terminating the life of the individual.

4.0 Child Under Alternative Treatment

22VAC40-705-30(C)(1). A child who, in good faith, is under treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination pursuant to § 63.2-100 of the Code of Virginia, shall not for that reason alone be considered a neglected child.

The *Code of Virginia* provides that no child shall be considered an abused or neglected child only for the reason that the child is under treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination. The religious exemption to a founded disposition of child abuse or neglect mirrors the statute providing a religious defense to criminal child abuse and neglect.[7] This exemption means that a founded disposition cannot be based only upon the religious practices of the parents or caretakers. A founded disposition can be rendered for other reasons. For example, if the parent caused the injury in the first place, the religious exemption would not apply. The religious exemption to a founded disposition of abuse or neglect is designed to protect a family's right to freedom of religion. The religious exemption statute is not to provide a shield for a person to abuse or neglect a child.[8]

Should there be a question concerning whether a child is under the treatment in accordance with a tenet or practice of a recognized church or religious denomination, the local department should seek the court's assistance. The court should decide whether the parent or caretaker is adhering to religious beliefs as the basis for refusal of medical or dental treatment.

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7 See: Va. Code § 18.2-371.1(C). Any parent, guardian or other person having care, custody, or control of a minor child who in good faith is under treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination shall not, for that reason alone, be considered in violation of this section.

8 The United States Supreme Court held in 1944 that "parents may be free to become martyrs themselves. But it does not follow that they are free, in identical circumstances, to make martyrs of their children before they can reach the age of full and legal discretion when they can make that choice for themselves." *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944).

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5.0 Medical Neglect of Infants with Life-Threatening Conditions

The Virginia Administrative Code 22VAC40-705-30(C) states that medical neglect includes withholding of medically indicated treatment. The definition section of 22VAC 40-705-10 et seq. defines withholding of medically indicated treatment as specific to infants. When conducting an investigation involving an infant deprived of necessary medical treatment or care, the local department must be aware of the ancillary definitions and guidance requirements.

> **22VAC40-705-10. "Withholding of medically indicated treatment" means the failure to respond to the infant's life-threatening condition by providing treatment (including appropriate nutrition, hydration, and medication) which in the treating physician's or physicians' reasonable medical judgment will be most likely to be effective in ameliorating or correcting all such conditions.**

This definition applies to situations where parents do not attempt to get a diagnosis even when the child's symptoms are severe and observable.

5.1 Withholding of Medically Indicated Treatment When Treatment is Futile

> **22VAC40-705-30(C)(2): For the purposes of this regulation, "withholding of medically indicated treatment" does not include the failure to provide treatment (other than appropriate nutrition, hydration, or medication) to an infant when in the treating physician's or physicians' reasonable medical judgment:**
> **a. The infant is chronically and irreversibly comatose;**
> **b. The infant has a terminal condition and the provision of such treatment would:**
> **(1) Merely prolong dying;**
> **(2) Not be effective in ameliorating or correcting all of the infant's life-threatening conditions; or**
> **(3) Otherwise be futile in terms of the survival of the infant; or**
> **(4) The infant has a terminal condition and the provision of such treatment would be virtually futile in terms of the survival of the infant and the treatment itself under such circumstances would be inhumane.**

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5.2 Definitions of Chronically and Irreversibly Comatose & Terminal Condition

22VAC40-705-10: "Chronically and irreversibly comatose" means a condition caused by injury, disease or illness in which a patient has suffered a loss of consciousness with no behavioral evidence of self-awareness or awareness of surroundings in a learned manner other than reflexive activity of muscles and nerves for low-level conditioned response and from which to a reasonable degree of medical probability there can be no recovery.

22VAC40-705-10: "Terminal condition" means a condition caused by injury, disease or illness from which to a reasonable degree of medical probability a patient cannot recover and (i) the patient's death is imminent or (ii) the patient is chronically and irreversibly comatose.

E. MENTAL ABUSE OR MENTAL NEGLECT

1.0 Statutory and Regulatory Authority

The *Code of Virginia* § 63.2-100 defines abused or neglected child. The Virginia Administrative Code defines mental abuse or neglect.

22VAC40-705-30(D). Mental abuse or neglect occurs when a caretaker creates or inflicts, threatens to create or inflict, or allows to be created or inflicted upon such child a mental injury by other than accidental means or creates a substantial risk of impairment of mental functions.

2.0 Caretaker's Actions or Omissions

Mental abuse or mental neglect includes acts or omissions by the caretaker resulting in harm to a child's psychological or emotional health or development. As a result of the caretaker's action or inaction, the child demonstrates or may demonstrate psychological or emotional dysfunction.

Mental abuse or mental neglect may result from caretaker actions or inactions such as: overprotection, ignoring, indifference, rigidity, apathy, chaotic lifestyle, or other behaviors related to the caretaker's own mental problems.

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Mental abuse or mental neglect may result from caretaker behavior, which is rejecting, chaotic, bizarre, violent, or hostile. Such behavior may include bizarre discipline. Bizarre discipline means any actions in which the caretaker uses eccentric, irrational or grossly inappropriate procedures or devices to modify the child's behavior. The consequence for the child may be mental injury or the denial of basic physical necessities or the threat of mental injury or denial of basic physical necessities.

Mental abuse or mental neglect includes the caretaker verbally abusing the child resulting in mental dysfunction. The caretaker creates a climate of fear, bullies and frightens the child. The caretaker's actions include patterns of criticizing, intimidating, humiliating, ridiculing, shouting or excessively guilt producing. Such behavior by the caretaker may result in demonstrated dysfunction by the child or the threat of harm to the child's mental functioning.

Mental abuse or mental neglect may also include incidents of domestic violence when the domestic violence may result in demonstrated dysfunction by the child or the threat of dysfunction in the child's mental functioning.

3.0 Professional Documentation Required For Mental Abuse or Mental Neglect

When making a founded disposition of mental abuse or mental neglect, the CPS worker must obtain professional documentation supporting a nexus between the actions or inactions of the caretaker and the mental dysfunction demonstrated by the child or the threat of mental dysfunction in the child. Professional documentation may include psychiatric evaluations or examinations, psychological evaluations or examinations, written summaries and letters. Professional documentation may be authored by psychiatrists, psychologists, Licensed Professional Counselors (L.P.C.) and Licensed Clinical Social Workers (L.C.S.W.), or any person acting in a professional capacity and providing therapy or services to a child or family in relationship to the alleged mental abuse. An employee of the local social services department may not serve as both the CPS investigator and the professional who documents mental abuse or mental neglect.

Failure to thrive describes several conditions in infants and children. Failure to thrive can be caused by a number of medical problems. In some children, failure to thrive can be caused by extreme neglect. Failure to thrive describes the malnourished and depressed condition of infants, implying not only growth deficits, but also disorders of behavior and development. Failure to thrive is classified as organic failure to thrive or nonorganic failure to thrive. Only nonorganic failure to thrive is considered to be a type of physical neglect or mental neglect. For a further discussion about failure to thrive, see the Appendix.

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4.0 Organic Failure to Thrive

22VAC40-705-30(D)(1). Failure to thrive occurs as a syndrome of infancy and early childhood which is characterized by growth failure, signs of severe malnutrition, and variable degrees of developmental retardation.

22VAC40-705-30(D)(2). Failure to thrive can only be diagnosed by a physician and is caused by nonorganic factors.

Failure to thrive is used to designate growth failure both as a symptom and as a syndrome.[9] As a symptom, it occurs in early childhood with a variety of acute or chronic illnesses that are known to interfere with normal nutrient intake, absorption, metabolism, or excretion, or to result in greater-than-normal energy requirements to sustain or promote growth. In these instances, it is referred to as organic failure to thrive and is not considered to be a child abuse or neglect.

5.0 Nonorganic Failure to Thrive

Nonorganic failure to thrive is considered to be physical neglect or mental abuse or neglect. Nonorganic failure to thrive most commonly refers to growth failure in the infant or child who suffers from environmental neglect or stimulus deprivation.[10] Nonorganic failure to thrive generally indicates the absence of a physiologic disorder sufficient to account for the observed growth deficiency.

Most children with nonorganic failure to thrive will manifest growth failure before one year of age, and in many children growth failure will become evident by 6 months of age. Nonorganic failure to thrive may be due to impoverishment, poor understanding of feeding techniques, improperly prepared formula, or inadequate supply of breast milk. Nonorganic failure to thrive is an interactional disorder in which parental expectations, parental skills and the home environment are intertwined with the child's development.[11] If left untreated, failure to thrive can lead to restricted growth and mental development. In extreme cases it can be fatal.

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[9] Berkow, M.D., Robert, Andrew J. Fletcher, M.B., Mark H. Beers, M.D., and Anil R. Londhe, Ph.D., Internet Edition-The Merck Manual, *Section 15, Pediatrics and Genetics, 191. Developmental Problems*, (17th ed. 1992).

[10] Id.

[11] Monteleone, Dr. James A., and Dr. Armand E. Brodeur, *Child Maltreatment: A Clinical Guide and Reference*, 14-16 (G.W. Medical Publishing 1994).

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5.1 Establish Nexus with Caretaker's Action or Inaction and the Nonorganic Failure to Thrive

When making a disposition, the CPS worker must establish a link between the caretaker's actions or inactions and the fact that the child suffers from nonorganic failure to thrive.

When responding to an allegation of failure to thrive, the local department should consider whether the caretaker sought accredited medical assistance and was aware of the seriousness of the child's affliction. The local department should consider whether the parents or caretakers provided an acceptable course of medical treatment for their child in light of all the surrounding circumstances.

F. SEXUAL ABUSE

1.0 Statutory and Regulatory Definition

The *Code of Virginia* § 63.2-100 defines abuse and neglect.

> **22VAC40-705-30(E). Sexual abuse occurs when there is any act of sexual exploitation or any sexual act upon a child in violation of the law which is committed or allowed to be committed by the child's parents or other persons responsible for the care of the child pursuant to § 63.2-100 of the Code of Virginia.**

The above regulatory definition includes any sexual act upon a child that violates the *Code of Virginia.* Although there is a definition of criminal sexual abuse in § 18.2-67.10.6, the CPS worker should consult with the local commonwealth's attorney or law enforcement. For a discussion about physical evidence and child sexual abuse, please see the Appendix.

2.0 Types of Sexual Abuse

All CPS sexual abuse reports must be investigated. The types of sexual abuse include but are not limited to:

2.1 Sexual Exploitation

Sexual exploitation includes but is not limited to,

a. The caretaker of the child allowing, permitting or encouraging a child to engage in prostitution as defined by the *Code of Virginia*.

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b. The caretaker of the child allowing, permitting, encouraging or engaging in the obscene or pornographic photographing, filming, or depicting of a child engaging in those acts as defined by the *Code of Virginia*.

2.2 Other Sexual Abuse

Most types of sexual abuse a child may suffer can be defined in one of the specified types. However, if the child has suffered a type of sexual abuse that is not one of the specified types, the CPS worker may document the type as Other Sexual Abuse and specifically describe the type of sexual abuse. Other sexual abuse may include, but is not limited to:

a. Indecent solicitation of a child or explicit verbal or written enticement for the purpose of sexual arousal, sexual stimulation or gratification;

b. Exposing the male or female genitals, pubic area or buttocks, the female breast below the top of the nipple, or the depiction of covered or uncovered male genitals in a discernibly turgid state to a child for the purpose of sexual arousal or gratification;

c. Forcing a child to watch sexual conduct.

"Sexual conduct" includes actual or explicitly simulated acts of masturbation, sodomy, sexual intercourse, bestiality, or physical contact in an act of apparent sexual stimulation or gratification with a person's clothed or unclothed genitals, pubic area, buttocks or breast.

d. Pursuant to §18.2-370.6 of the Code of Virginia, french kissing a child younger than 13 years of age by an adult caretaker.

2.3 Sexual molestation

Sexual molestation means an act committed with the intent to sexually molest, arouse, or gratify any person, including, but not limited to:

a. The caretaker intentionally touches the child's intimate parts or clothing directly covering such intimate parts;

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b. The caretaker forces the child to touch the caretaker's, or another person's intimate parts or clothing directly covering such intimate parts; or

c. The caretaker forces another person to touch the child's intimate parts or clothing directly covering such intimate parts. "Intimate parts" means the genitalia, anus, groin, breast, or buttocks of any person.

d. The caretaker causes or assists a child under the age of 13 to touch the caretaker's, the child's own, or another person's intimate parts or material directly covering such intimate parts.

2.4 Intercourse and sodomy

Intercourse or sodomy includes acts commonly known as oral sex (cunnilingus, anilingus, and fellatio), anal penetration, vaginal intercourse and inanimate object penetration.

3.0 Establishing Sexual Gratification or Arousal

To make a founded disposition of sexual abuse in some cases, the local department may be required to establish sexual gratification or arousal. It may not be necessary to prove actual sexual gratification, including but not limited to that one of the parties achieved sexual gratification. However, it may be necessary to establish that the act committed was for the purpose of sexual gratification. The Virginia Administrative Code does not specify which party (the perpetrator or the alleged victim child) needs to be the party intended to be sexually gratified.

In some cases there will be physical evidence of sexual gratification, including but not limited to the presence of semen. Sexual gratification or arousal may be inferred by the totality of the circumstances surrounding the alleged act.[12]

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12 For example, in McKeon V. Commonwealth, 211 Va. 24, 175 S.E.2d 282 (1970), the Virginia Supreme Court held that a man who exposed his genitals to a child 35 feet away did not violate Va. Code '18.1-214 (1950). The defendant claimed that he had a robe on, and that, although there was a breeze, he did not believe his private parts became exposed. The child alleged that the man was standing on his porch smiling with his hands on his hips and his genitals exposed. The Court said that, even accepting the child's testimony as true, the Commonwealth failed to prove lascivious intent:

[T]here is no evidence that the defendant was sexually aroused; that he made any gestures toward himself or to her, that he made any improper remarks to her; or that he asked her to do anything wrong. The fact that defendant told [the victim] to turn around and that he was smiling at the time, when she was 35 feet

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Sexual gratification may be established by considering the act committed and the alleged abuser's explanation or rationale for the act.[13] The act itself may be probative of the caretaker's intent to arouse or sexually gratify.[14] It may be helpful to consider the definition of lascivious intent or intent to defile, since establishing lascivious intent or intent to defile is necessary in many child sexual abuse criminal offenses.[15] When attempting to show that an act committed was for the purpose of sexual gratification, the local department must consider the evidence in its totality.

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away from him, is not proof beyond a reasonable doubt that he knowingly and intentionally exposed himself with lascivious intent.

In McKeon V. Commonwealth, the Court looked for another evidence indicating that the alleged perpetrator intentionally exposed himself to the child and found none. If the alleged perpetrator had made any comments or actions to the child suggesting that the child look at his exposed genitals, then the court may have held differently. If the alleged perpetrator had been sexually aroused and exposed himself directly to the child, the court may have sustained the conviction. However, in Campbell v. Commonwealth 227 Va. 196, 313 SE.2d 402 (1984), the court found the evidence that the perpetrator gestured to an eight-year-old girl 87 feet away from him, pulled his pants down to his knees, then gestured again was sufficient to establish lascivious intent.

13 For example, in Walker v. Commonwealth 12 Va. App. 438, 404 S.E.2d 394 (1991), the court found the evidence sufficient to establish criminal intent in defendant's touching the vagina of a seven-year-old daughter of his girlfriend even though he claimed to be touching her to determine if she and some boys in the neighborhood had been touching each other. The court found the alleged perpetrator's explanation for touching the child's vaginal area to be woefully unsatisfactory.

14 In some investigations, evidence establishing the act will be sufficient, in and of itself, to establish sexual gratification or arousal. For example, in Moore v. Commonwealth, 222 Va. 72, 77, 278 S.E.2d 822, 825 (1981), the court found the evidence establishing that the perpetrator touched his penis to the child's buttocks was sufficient to show defendant's lascivious intent.

15 Lascivious is defined as "tending to excite; lust; lewd; indecent; obscene." Black's Law Dictionary 897, (8th ed. 2004). Defile is defined as "4. To morally corrupt (someone). 5. *Archaic*. To debauch (a person); to deprive (a person) of chastity." Black's Law Dictionary 455 (8th ed. 2004)